IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1626

DANIEL FREEMAN,	*	
	*	
Plaintiff-Appellant,	*	Appeal from the
	*	United States
and MARY FREEMAN,	*	District Court for
	*	the Western
Plaintiff,	*	District of
	*	Virginia.
	*	
v.	*	Hon. Glen M.
	*	Williams,
CASE CORPORATION, a/k/a	*	Judge Presiding
J.I. Case Company, A Tenneco	*	
Corporation; CASE	*	
INTERNATIONAL,	*	
	*	
Defendants-Appellees.	*	

Argued: May 6, 1997

Decided: July 8, 1997

Before HAMILTON and MOTZ, Circuit Judges, and LEGG, United States District Judge for the District of Maryland, sitting by designation.

DIANA GRIBBON MOTZ, Circuit Judge:

In this product liability diversity case, after the jury awarded the plaintiff substantial damages, the district court granted the defendant's motion for judgment. Because the district court erred in concluding that the hazard presented by defendant's product was open and obvious as a matter of law, and because sufficient evidence supported the jury verdict, we reverse and remand for further proceedings.

I.

Daniel Freeman purchased a Case International 1130 tractor with a mower attachment ("1130" or "mower" or "tractor") to care for his lawn. On May 22, 1992, the second time he used the 1130, Freeman suffered a serious accident.

While Freeman was mowing his lawn near a rocky slope, the mower blades glanced against a partially-buried boulder. Freeman lifted his foot off the speed ratio control pedal, bringing the tractor to a stop; he then pushed in the clutch and brake pedals and raised the mower attachment, intending to see if the rock had damaged the blades. Freeman had never used the brakes before because the mower is designed not to move unless the rider is pressing the speed ratio control pedal. Freeman removed his foot from the clutch to allow the blades to spin in order to check their alignment, planning then to back away from the boulder. Suddenly, the mower lunged forward, toward, and then over, the rocky embankment. Freeman leapt away from the machine, rolling forty feet down the hill. He came to rest on his stomach, safely, but the 1130 tumbled down on top of him, with the mower blades still activated. The blades severely and permanently injured him.

Freeman initiated this action against Case asserting negligence and breach of implied warranties. Two asserted defects in the mower provided the factual basis for both of these theories.

First, Freeman alleged that the brake pedal, which was located directly above the speed ratio control pedal, was too close to that pedal so that when a rider released the clutch and attempted to brake the mower, he risked pushing both pedals at the same time. Simultaneous engagement caused the 1130 to lurch forward once the clutch was released because the brakes were unable to override the mower's forward propulsion.[1] Freeman maintained that this defect caused his accident.

Freeman also claimed that the 1130 was defective because it was not equipped with an operator presence control device, which would have discontinued power to the mower blades as soon as Freeman's weight left the tractor seat. If the mower had been designed with an operator presence control device, Freeman contended, the blades would have been moving much more slowly, if at all, by the time they hit him, and would not have injured him so badly.

A jury heard the case for seven days in October and November 1995 and awarded Freeman $3.8 million in compensatory damages. On a special verdict form the jury expressly found that Case negligently designed the 1130 in a manner that made it unreasonably dangerous, that the negligence proximately caused the accident, that Freeman was not contributorily negligent, and that he did not assume

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[1] The mower is equipped with split brakes to allow for separate braking of the rear wheels. The brakes can be latched together for straight braking and apparently were so latched at the time of the accident. Although there does not appear to be direct evidence on this point, no party has suggested to the contrary.

the risk of injury by voluntarily exposing himself to a known danger. The jury also found that Case breached its "implied warranty of merchantability and/or fitness for a particular use," that Freeman did not unforeseeably misuse the mower, and that the defects that made the 1130 unreasonably dangerous were not open and obvious.

Case moved for judgment as a matter of law and a new trial. On April 19, 1996, the court granted Case judgment as a matter of law because it found that the proximity of the pedals and the absence of the operator presence control device were open and obvious hazards. *See Freeman v. Case Corp.*, 924 F. Supp. 1456, 1467-68 (W.D. Va. 1996). The court also concluded that although Freeman had presented sufficient evidence of an unreasonably dangerous defect in the lack of an operator presence control device, he failed to present sufficient evidence of an unreasonably dangerous defect in the pedal configuration. *Id.* at 1462-64. Additionally, the court held that Freeman had failed to establish a breach of the implied warranty of fitness for a particular purpose and entered a conditional order granting a new trial on that issue. *Id.* at 1464. Finally, the court preliminarily determined that the $3.8 million jury award was excessive. *Id.* at 1473-74.

Freeman appeals. Because our jurisdiction is based on diversity of citizenship — a suit by a Virginia resident against a Delaware corporation — we must apply the law of the state where the accident occurred, Virginia. In doing so, we review de novo the district court's grant of judgment as a matter of law to determine whether the evidence presented at trial, viewed in the light most favorable to Freeman, would have allowed a reasonable jury to render a verdict in his favor. *See Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996). We review the district court's conditional grant of a motion for new trial for abuse of discretion, *see City of Richmond v. Madison Management*

Group, Inc., 918 F.2d 438, 458 (4th Cir. 1990), recognizing that an error of law constitutes an abuse of discretion. *See United States v. Koon*, 116 S. Ct. 2035, 2047 (1996); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

II.

The district court held, as a matter of law, that the mower's asserted defects were open and obvious.[2] If that conclusion is correct, it bars Freeman's recovery under either a contract or tort theory. This is so because in Virginia, a plaintiff cannot recover for a breach of an implied warranty or negligence if the "purported defect of which the plaintiff complains was 'known, visible or obvious' to him." *Wood v. Bass Pro Shops, Inc.*, 462 S.E.2d 101 (Va. 1995) (citing *Brockett v. Harrell Bros.*, 143 S.E.2d 897, 902 (Va. 1965)) (applying open and obvious defense in warranty); *Harris-Teeter, Inc. v. Burroughs*, 399 S.E.2d 801 (Va. 1991) (applying open and obvious defense in negligence).

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[2] Case also asserted two other affirmative defenses at trial, which it reasserts on appeal: unforeseeable misuse and contributory negligence. Both the jury and the district court rejected the unforeseeable use defense and, contrary to Case's assertion on appeal, that decision was clearly correct. Information contained in the 1130's promotional literature and owner's manual provides solid evidence that Case contemplated Freeman's actions, including lawn mowing on slopes, in designing and marketing the 1130. As to contributory negligence, although the jury found Freeman was not contributorily negligent, the district court granted Case judgment as a matter of law on this point. In view of our holding here, we need not evaluate the merits of that determination because even if the district court were correct, contributory negligence could not bar Freeman's warranty claim. *See Brockett v. Harrell Bros.*, 143 S.E.2d 897, 902 (Va. 1965) (holding that contributory negligence is not a defense to a breach of warranty claim).

"A risk is open and obvious if the person using the product is or should be aware of the risk." *Austin v. Clark Equip. Co.*, 48 F.3d 833, 836 (4th Cir. 1995) (interpreting Virginia law). Whether a hazard is open and obvious is a question of fact, and should be left to the jury when "the evidence [is] in conflict." *Morgen Indus., Inc. v. Vaughan*, 471 S.E.2d 489, 492-93 (Va. 1996).

In granting judgment to Case, the district court determined that the arrangement of the brake and speed ratio control (SRC) pedals was open and obvious. While this may be true, it is not dispositive of the issue. The relevant question under Virginia law is not whether the defect itself — here the pedal arrangement — was obvious, but whether the hazard — the risk of inadvertent coengagement causing the tractor to lurch after release of the clutch — was open and obvious.[3]

For example, in *Morgen*, 471 S.E.2d at 491, the asserted defect was an unguarded "nip point." The nip point is simply the point on a rail where the rail meets a wheel rolling on it, a design feature clearly visible to an observer. The plaintiff's expert testified nevertheless "that 'nip points' are not *dangers* that are obvious to most people." *Id.* (emphasis added). Despite testimony to the contrary, the Virginia Supreme Court found that "the jury was entitled to accept [the expert's] testimony that the hazard was not open and obvious." *Morgen*, 471 S.E.2d at 492. Thus, Virginia law looks not to whether the defect itself was obvious, but whether the *hazard* was clearly apparent.

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[3] Because we conclude that the hazard of inadvertent coengagement of the two pedals leading to unexpected lurching was not open and obvious, we need not reach the question of whether the absence of an operator presence control device also presented an open and obvious hazard.

Here, the hazard — that the pedals could easily be inadvertently coengaged and that coengagement could cause the mower to lurch because the brakes would not override the SRC — is far from obvious. Indeed, an operator might well not realize that the mower's pedals were coengaged unless he looked down at his feet. Unlike the accelerator pedal in an automobile, the SRC operates on hydrostatic principles; pressing the SRC does not affect engine speed so the operator would not perceive a change in engine noise due to faster engine rotation were the SRC inadvertently engaged.

Moreover, Case's expert testified that the brakes should overpower the SRC if an operator simultaneously pushes both pedals. This testimony alone would prevent a conclusion as a matter of law that the hazard caused by the brake's failure to override the SRC was "obvious." Case itself said such a hazard did not exist. Finally, the jury examined Freeman's mower in detail — two jurors actually sat in the operator's position, observed the pedals from that perspective, and pushed them — before the jury concluded that the defect was not open and obvious.[4]

Viewing the evidence in the light most favorable to Freeman, as we must, the jury could reasonably have determined that the hazard presented by the pedals' proximity combined with the strength of the brakes relative to the SRC was not open and obvious. Case was not entitled to judgment as a matter of law on this basis.

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[4] Case argues on appeal that a new trial is necessary merely because some jurors sat on the tractor. *See United States v. Beach*, 296 F.2d 153 (4th Cir. 1961). The district court rejected this argument, as do we. The jurors' inspection of the tractor merely constituted "a more critical examination of an exhibit." *Id.* at 159 (citation omitted). Such an examination is permissible. *Id.*

III.

Our conclusion that the district court erred in finding the alleged hazards "open and obvious" as a matter of law does not automatically require reinstatement of the jury verdict. This is so because the district court alternatively held that Freeman failed to present sufficient evidence that the pedal configuration and attendant hazard constituted an unreasonably dangerous design defect under Virginia law and so Case might be entitled to judgment on this ground.[5] We believe, however, that Freeman presented sufficient evidence from which a jury could conclude that the pedal configuration and associated risk of sudden forward movement made the 1130 unreasonably dangerous.

To establish this defect, Freeman presented testimony by Smith Reed, an expert in mechanical engineering, who belonged to a number of engineering societies and had successfully completed the examinations necessary to become a registered professional engineer. Reed had previously

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[5] The district court also indicated that were this court to find the open and obvious affirmative defenses inapplicable, but that the evidence as to the hazard presented by the pedal configuration was insufficient, it would consider granting a new trial. The court believed that in that case a new trial might be warranted because the evidentiary insufficiency might have been due to its own decision to exclude all evidence regarding competing products, which it feared might have been erroneous. *See Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420-21 (4th Cir. 1993) (finding that "actual industry practices," in the aggregate, could indicate consumer expectations, one way to prove unreasonably dangerous design) (citing *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991)). The district court never granted a conditional new trial on this issue and, of course, since we hold that Freeman has presented sufficient evidence to the jury to sustain its verdict, a new trial to allow Freeman to present additional evidence would obviously be unnecessary.

testified as an expert in mechanical engineering in federal court in the Eastern District of Virginia — most recently just a week before trial. Reed also had spent several years working for one of Case's competitors designing mowers and tractors. Case did not object to Reed's engineering qualifications or expertise in the field of mechanical engineering. Nor did Case maintain that Reed's testimony was not relevant. But Case did assert that Reed's testimony was legally insufficient.

The district court rejected Case's argument and permitted Reed to testify before the jury.[6] Post-trial, however, the

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[6] The district court refused to hold Reed's testimony inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), reasoning that *Daubert* only applied to scientific testimony and not technical testimony, like Reed's. We need not here decide the question that the Supreme Court left open, *i.e.* whether the *Daubert* analysis applies outside the scientific context, because Case misunderstands the *Daubert* test in attempting to apply it here. *Daubert* instructs district courts to make a "preliminary assessment of whether the reasoning or methodology" underlying expert testimony "is scientifically valid." *Id.* at 590 n.8, 592-93. Essentially, Case does not challenge Reed's "reasoning or methodology" but his ultimate conclusion, that the 1130 is unreasonably dangerous. In cases like this one, where an expert relies on his experience and training and not a particular methodology to reach his conclusions, "application of the *Daubert* [analysis] is unwarranted." *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996); *see also United States v. Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997) (holding *Daubert* inapplicable to testimony based on experience or training); *United States v. 14.38 Acres of Land, More or Less Situated in LeFlore County*, 80 F.3d 1074, 1078-79 (5th Cir. 1996) (same); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) (same). Thus, we affirm the district court's rejection of the *Daubert* challenge to Reed's

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court concluded that although it was a "difficult question," Reed's testimony was insufficient to support the jury's finding. *Freeman*, 924 F. Supp. at 1463. In reaching this conclusion, the court relied heavily on our decision in *Alevromagiros v. Hechinger*, 993 F.2d at 417, 421 (4th Cir. 1993). There, we refused to credit an expert witness who "testified to no customs of the trade, referred to no literature in the field, and did not identify the reasonable expectations of customers," but merely gave "his own subjective opinion." *Id.* *Alevromagiros*, however, does not compel the conclusion that Reed's testimony was insufficient in this case.

Unlike the expert in *Alevromagiros*, Reed did not simply opine on the basis of his "own subjective opinion." Rather, he applied his experience and training in tractor design in reviewing numerous published materials, including papers by the Society of Agricultural Engineers, extensive industry literature, various tractor specifications, and trade journals before reaching his conclusions. Reed also inspected Freeman's 1130 and performed various tests on it, which indicated that the tractor did indeed lurch when both the SRC and brake pedals were pressed and the clutch released.[7] In

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[6](...continued)
testimony, albeit on somewhat different grounds.

[7] Case protests that Reed's testing of the 1130 was inadmissible because the testing conditions were not sufficiently similar to those at the time of the accident, since the tractor was no longer in its original condition. However, the district court acted within its discretion in admitting this testimony. Such tests are only inadmissible when testing conditions are "so dissimilar to the conditions existing at the time of the accident '. . . in such fundamental and important respects that the risk of prejudice to . . . [the defendant] outweighs the probative value of the evidence.'" *Chase v. General Motors Corp.*, 856 F.2d 17, 20 (4th Cir. 1988) (citing *Gladhill v. General Motors Corp.*, 743 F.2d
(continued...)

view of the published authorities, his inspection of the 1130, and his "sound engineering judgment," Reed opined that the 1130's pedal design was unreasonably dangerous. Although Reed could not cite any published source that analyzed the 1130's specific configuration and found it defective, Reed clearly applied his expertise and knowledge of the published sources and drew from his detailed inspection of the product itself in evaluating the configuration at issue here. Significantly, he identified specific published materials that had directly guided his analysis. Virginia law is clear that an expert opinion need not find direct support in published sources; some analogies will have to be drawn. *See Ford Motor Co. v. Bartholomew*, 297 S.E.2d 675, 679 (Va. 1982) (finding that when "safety standards . . . had never been promulgated, . . . it was a matter of opinion of trained experts what design was safe for its intended use").

Case thoroughly cross-examined Reed and at that time highlighted what it perceived to be deficiencies in his analysis. Case also introduced the testimony of its own expert, who asserted a contrary theory. Case does not challenge the court's instructions to the jury as to burden of proof or as to how the jury was to assess the expert testimony. Thus, the court afforded Case the "appropriate means" for discrediting the expert testimony it found suspect. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination,

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[7](...continued)
1049, 1052 (4th Cir. 1984)). Here, a Case employee acknowledged that the only significant change in the condition of the tractor after the accident was that its battery had died.

In addition, Case inaccurately claims that neither Freeman nor Reed "made any reference to simultaneous clutch use as a defect in the tractor." In fact, both Freeman and Reed testified at length regarding the relationship between clutch use and the accident. *See* J.A. 227-29, 264, 346-61, 667-70, 677.

presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

Reed's testimony regarding the pedal arrangement, particularly when combined with the jury's opportunity to inspect the tractor itself and judge the likelihood (or not) of inadvertent coengagement, was sufficient to sustain the jury's verdict that the pedal design and associated risk of lurching was unreasonably dangerous.

IV.

The district court believed that a new trial would be required, even if it erred in its ruling on the obviousness of the design defect, because of the imprecise phrasing of the warranty question on the special verdict form.

The special verdict form asked the jurors to determine whether "the defendant breached an implied warranty of merchantability and/or fitness for a particular purpose;" the jurors answered yes. But after trial the district court concluded as a matter of law that there had been no proof of breach of the warranty of fitness for a particular purpose because Freeman presented no evidence that he relied on Case in selecting a product particularly suited for his needs. *See* generally *Medcom, Inc. v. C. Arthur Weaver Co.*, 348 S.E.2d 243, 246 (Va. 1986) (discussing elements of breach of implied warranty of fitness for a particular purpose). For this reason, the court believed a retrial would be necessary to determine whether Case breached the warranty of merchantability because the jury could have answered the special verdict question in the affirmative without having found a breach of that warranty.

In the case at hand, however, it would not have been possible for the jury to find a breach of the warranty of

fitness for a particular purpose without also finding a breach of the warranty of merchantability. When, as here, the buyer's particular purpose is the same as the intended purpose of the product (lawn mowing), the two warranties are identical, except that to prove breach of the warranty of fitness for a particular purpose, the buyer must additionally prove that he informed the seller of his purpose and relied on the seller's judgment in selecting a product appropriate for that purpose. *See* Walter H.E. Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 Rutgers L. Rev. 493, 506-07 (1962), cited with approval in *Featherall v. Firestone Tire & Rubber Co.*, 252 S.E.2d 358, 367 (Va. 1979). These additional elements are the ones Freeman failed to prove.

Therefore, all of the elements of a breach of the warranty of merchantability would have been established by a jury finding of a breach of the warranty of fitness for a particular purpose. The jury could not have found a breach of the warranty of fitness for a particular purpose without also finding a breach of the warranty of merchantability. For this reason, the district court's conditional grant of new trial on the breach of warranty issue constituted a clear error of law and, therefore, an abuse of its discretion. *See Koon*, 116 S. Ct. at 2035; *Cooter & Gell*, 496 U.S. at 405.

V.

Finally, the district court made a preliminary determination that the jury's award of $3.8 million was "excessive." *Freeman*, 924 F. Supp. at 1473-74. In view of its grant of judgment to Case, the court did not explain its rationale nor did it make a final decision on the matter. Accordingly, we have no way of assessing this holding. However, we are confident that on remand the district court will carefully consider this question and will, as it indicated it would if the occasion presented itself, "further elaborate on

its decision that the verdict is excessive." *Id.* at 1474. We reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1626
CA-94-63-A

DANIEL FREEMAN, Plaintiff - Appellant

and

MARY FREEMAN, Plaintiff

v.

CASE CORPORATION, a/k/a J.I. Case Company,
A Tenneco Corporation; CASE INTERNATIONAL,

Defendants - Appellees

Filed: August 5, 1997

On Petition for Rehearing with Suggestion for
Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DANIEL FREEMAN,	)	
	)	CIVIL ACTION NO. 94-0063
Plaintiff,	)	
v.	)	MEMORANDUM OPINION
	)	
CASE CORPORATION,	)	BY: THE HONORABLE GLEN M. WILLIAMS
	)	
Defendant.	)	

Filed: April 19, 1996

This products liability case is before the court pursuant to 28 U.S.C. § 1332. Plaintiff Daniel Freeman was injured in a tractor accident. Freeman sued defendant Case Corporation ("Case") under theories of defective design and breach of warranty, and, following a jury trial, was awarded $3.8 million. Case now moves for judgment as a matter of law, or, in the alternative, for a new trial, and also moves for remittitur of the damages awarded against it. The motion for judgment as a matter of law is granted.

FACTS

Daniel Freeman ("Freeman") is an experienced owner and operator of a wide variety of heavy and light industrial, home, and recreational equipment. Before buying the Case 1130 tractor that is the subject of this case, Freeman had used a smaller John Deere riding mower for many years to mow his lawn. The Deere comes equipped with an operator presence control ("OPC"), a safety device that quickly stops the mower blades if the operator's weight leaves the seat. Freeman decided to purchase a Case 1130 after seeing and

admiring one owned by an acquaintance. He visited a dealer, where he requested a Case 1130 and asked that it be fitted with a belly mower attachment. The tractor, so equipped, was later delivered to his home.

The Case 1130 does not have an OPC, but it comes with a rollbar and a seat belt. Together, a rollbar and seat belt are known in the trade as a Rollover Protection System, or ROPS. A ROPS is designed to protect an operator in a tractor tipover situation: the rollbar keeps the tractor from rolling all the way over, or provides protection if it does, and the seat belt keeps the operator within the zone of safety.

Upon receiving his Case 1130, Freeman examined portions of the accompanying manual, and also inspected the tractor itself. Prior to the accident, he had mowed his yard twice and spread fertilizer once with the tractor. On the day of his injury, Freeman was not using the seat belt. While mowing near a steep embankment in his back yard, Freeman drove the tractor over a partially buried boulder. Although the Deere had never done so, the mower blades of the Case 1130, being set slightly lower, struck the top of the boulder. Freeman immediately stopped the tractor, depressed the clutch to disengage power to the blades and the wheels, and raised the mower deck so that the blades would not strike the rock when restarted. His plan was to then release the clutch to spin the blades in the air, in order to determine if they had been warped by striking the rock. Freeman claims that his foot was on the brake pedal, which is located in close proximity to the speed ratio control pedal ("SRC").[1] He in fact had both the brake and the SRC depressed. Thus, when he released the clutch, the tractor moved forward over the edge of the embankment. Freeman was unable to stop or to regain control of the tractor. He leapt from the machine, but

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[1] This pedal, which makes the tractor move forward, is analogous to an automobile's accelerator.

was struck by the blades and severely injured as the tractor rolled down the hill.

ANALYSIS

A postverdict motion for judgment as a matter of law is evaluated by the same standard as one made during trial. *See Crown Central Petroleum Corp. v. Brice*, 427 F. Supp. 638, 640 (1977). The standard for a party to receive judgment as a matter of law is a high one. The court will construe all evidence and inferences in the light most favorable to the non-moving party, and will grant the motion only if a reasonable trier of fact could reach no other conclusion. *Winant v. Bostic*, 5 F.3d 767, 774 (4th Cir. 1993). In doing so, the court will consider neither the weight of the evidence nor the credibility of witnesses. *Singer v. Duncan*, 45 F.3d 823, 826 (4th Cir. 1995); *L.M. Everhart Const. v. Jefferson County*, 2 F.3d 48, 51 (4th Cir. 1993).

The standard for granting a new trial is lower than that for judgment as a matter of law. Under Rule 59, the court will weigh the evidence and the credibility of the witnesses, and may in its discretion grant a new trial if it considers the verdict to be against the clear weight of the evidence. *Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989).

With these standards in mind, the court now turns to the issues before it. Case's brief sets forth seven major arguments or classes of arguments: (1) Freeman failed to present sufficient evidence of an unreasonably dangerous design defect; (2) Freeman failed to present sufficient evidence that the implied warranty of fitness for a particular purpose was breached; (3) Freeman failed to prove that the alleged defects were the proximate cause of his injuries; (4) the expert testimony offered by Freeman should have been excluded as inadmissible; (5) the affirmative defenses of open

and obvious danger, contributory negligence, assumption of the risk, and unforeseeable misuse bar recovery; (6) two jurors improperly tested the tractor during a showing; and (7) the verdict was excessive. Although the court's decision to grant Case's motion for judgment as a matter of law renders many of Case's arguments moot, the issues raised are of legal interest and are likely to be useful to any court that may review this decision. Each shall be discussed in turn.

I. Evidence of Unreasonably Dangerous Defect

At trial, Freeman attempted to prove two design defects in the Case 1130 tractor. First, he presented evidence that the brake pedal was placed dangerously close to the SRC, and that this proximity created an unacceptable risk of inadvertent engagement of the SRC by an operator trying to brake. Second, he contended that the absence of an OPC made the tractor unreasonably dangerous.

Under Virginia law, two factors are relevant to the determination of whether a product contains an unreasonably dangerous defect: industry or government safety standards, and consumer expectations. *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 421 (4th Cir. 1993); *Mears v. General Motors*, 896 F. Supp. 548, 551 (E.D. Va. 1995). Proving a violation either of a safety standard or of consumer expectations can discharge a plaintiff's burden. *Alevromagiros*, 993 F.2d at 422.[2] If published safety

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[2] The court misstated this fact in its decision in *Lemons v. Ryder Truck Rental, Inc.*, 906 F. Supp. 328, 331 (W.D. Va. 1995), where it said that the issue of consumer expectations is reached only if the plaintiff fails to demonstrate violation of a safety standard. The court knows of no Virginia case in which consumer expectations were considered without first or simultaneously considering the proof offered of violation of a

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standards exist, the court will rely on these. Otherwise, it is "a matter of opinion of trained experts what design was safe for its intended use." *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430, 297 S.E.2d 675, 679 (1982). Merely conclusory expert testimony without substantial foundation will not discharge this burden. *Compare id.* (accepting sufficiency of expert testimony supported by manuals, data compiled by federal agency, consultation with other experts, experiments with product in question and other similar products, and mockup of product) *with Alevromagiros*, 993 F.2d at 421 (rejecting sufficiency of expert testimony based solely on inspection of the product in question).[3]

To demonstrate consumer expectations, the plaintiff may use "evidence of actual industry practices, knowledge at the time of other injuries, knowledge of dangers, published literature, and . . . direct evidence of what reasonable purchasers consider defective." *Alevromagiros*, 993 F.2d at 420-21 (citing *Sexton v. Bell Helmets*, 926 F.2d 331, 337 (4th Cir. 1991) (applying Kentucky law)). Expert testimony on this issue may not simply be conclusory, but "requires a factual examination of what society demanded or expected from a product." *Sexton*, 926 F.2d at 337.

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[2](...continued)
safety standard, but it appears that such an analysis is possible under Virginia law.

[3] This is not an issue of the admissibility of proffered expert testimony, *see generally* Part IV of this Opinion, but simply a restatement of the familiar rule that a party with the burden of proof must come forward with enough evidence to sustain a verdict in its favor or face an adverse judgment as a matter of law. *See Alevromagiros*, 993 F.2d at 421.

A. Pedal Configuration

Freeman offered the expert testimony of Smith Reed, a mechanical engineer, to demonstrate that both the pedal configuration and absence of an OPC were unreasonably dangerous design defects. Reed testified to no published government or industry standard violated by the pedal configuration.[4] The court must therefore determine whether Reed's testimony was sufficient to establish violation of an applicable unpublished safety standard. *Bartholomew*, 224 Va. at 430, 297 S.E.2d at 679. Reed stated that, in preparation for his testimony, he reviewed extensive trade literature and notes pertaining to the design of the Case 1130 and of other tractors of varying sizes and configurations, the design of tractors generally, trade journals, accident statistics, industry and military specifications, and other assorted materials. Transcript for 10/25/95 at 18-24. Reed inspected the tractor that injured Freeman, and performed "tests" on it by manipulating various controls, operating the tractor while attempting to recreate the sudden forward movement described by Freeman, and placing his foot on the brake and SRC pedals to test his theory that both could be engaged simultaneously. *Id.* at 28-29. He stated that his opinion that the pedal configuration was a design defect was based on "sound engineering judgment," on "what the competition is doing," and on various standards that were either not proven or not relevant. *Id.* at 39-40. Reed's "sound engineering judgment" was not a basis for his opinion, but rather a mere restatement of that opinion. Reed characterized his "sound engineering judgment" as follows: "[w]hen one knows that it is possible to cause a machine to unexpectedly come on, spontaneously start moving, and

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[4] Although Reed testified in a deposition that ANSI 335.4 had been violated by the pedal configuration, he stated at trial that upon reconsideration he could not maintain this position. Partial Trial Transcript ("Transcript") for 10/25/95 at 62.

when one has the ability to minimize or eliminate the problem by the design and when the design has not been eliminated . . . the design should not be released for production." *Id.* at 39.

The foundation for Reed's opinion is somewhere between the extensive testing found sufficient in *Bartholomew* and the near-total absence of evidence rejected in *Alevromagiros*. The primary difference between *Alevromagiros* and this case is that Reed reviewed extensive literature prior to making his inspection. Whether this is sufficient is a difficult question, given the dearth of guidance on this subject in Virginia law. The court holds that Reed's testimony was not sufficient to carry plaintiff's burden, since nothing suggests that the literature reviewed significantly bolstered Reed's opinion that the design of the pedals was defective.[5]

This holding would ordinarily require the court to enter judgment as a matter of law for Case on this issue, but the court declines to do so, since Freeman's inability to prove a design defect may have been due to judicial error rather than his own lack of evidence. Reed's reference to the design practices of Case's competitors, one of the bases he mentioned for his opinion that the pedals were defective, may have foreshadowed illuminating testimony, both as to the issue of the applicable safety standard in the industry and as to what consumers expected. *See Redman v. Sentry Group, Inc.*, 907 F. Supp. 180, 183 n.2 (W.D. Va. 1995) (in absence of published standards, industry practice can be evidence of industry standards); *Alevromagiros*, 993 F.2d at 420-21 (industry practice relevant to consumer expectations).

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[5] It is not clear that plaintiff could under any circumstances sustain the burden of proving that the pedal configuration of the tractor was defective. *See* footnote 12, *infra*. Because of its decision to grant judgment as a matter of law to Case on other grounds, the court does not reach this issue.

However, the court did not permit either side to introduce evidence of industry practice with respect to pedal placement. Transcript for 10/25/95 at 41. It is unclear whether this was erroneous under applicable Fourth Circuit law. *Alevromagiros*, which states that industry practices are relevant to determining consumer expectations, 993 F.2d at 420, also upholds a District Court's decision to exclude evidence of safety features on a competing product, *id.* at 421-22.[6] While it is unnecessary to reach the issue at this time due to its decision to grant Case's motion for judgment as a matter of law, if that decision is reversed and the case remanded, the court may then find it necessary to grant a new trial at which evidence of industry practices with respect to pedal placement would be heard.

B. Operator Presence Control

Reed testified that the absence of an OPC violated ANSI B71.1, a standard that by its terms applies to "lawn and garden" tractors. Both sides vigorously contested the issue of whether the Case 1130 is a lawn and garden tractor, presenting evidence about its size, weight, power, and "drawbar pull," a measure of pulling capacity. Although the 1990 ANSI definition of "lawn and garden tractor" excludes those with a drawbar pull over 1500 pounds, which the Case 1130 in question apparently exceeded, no such definition

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[6] The language used hints that it may have been the fact that only one competing product was offered rather than the relevance of industry practice generally that led to the District Court's decision to exclude the proffered evidence. *Alevromagiros*, 993 F.2d at 422 (noting that the trial judge stated that "bringing in *one particular competitor's ladder* . . . and making that an industry standard, that is terribly misleading") (emphasis added); *Anderson v. National R.R. Passenger Corp.*, 866 F. Supp. 937, 944 (E.D. Va. 1994) (citing *Alevromagiros* for proposition that a single example cannot be used to establish an industry standard).

existed at the time the tractor was manufactured. In addition, Freeman presented evidence that Case advertised the tractor for suburban lawn care applications. The jury could quite reasonably have concluded that ANSI B71.1 was applicable to this tractor, and such a conclusion is not against the clear weight of the evidence. The court thus denies Case's motion for judgment as a matter of law and its motion for a new trial with respect to this issue.

II. Evidence of Breach of Implied Warranties

Case contends that Freeman did not present sufficient evidence that it breached the implied warranty of fitness for a particular purpose. Under Virginia law, to establish a breach of the warranty of fitness, Freeman must prove (1) that Case had reason to know the particular purpose for which Freeman required the equipment; (2) that Case had reason to know Freeman was relying upon Case's skill or judgment to furnish equipment meeting his requirements; and (3) that Freeman in fact relied upon Case's skill or judgment. Va. Code § 8.2-315; *Medcom, Inc. v. C. Arthur Weaver Co., Inc.*, 232 Va. 80, 84-85, 348 S.E.2d 243, 246 (1986). Case points to Freeman's testimony that he decided to buy a Case 1130 because he had seen a privately owned one in operation and "liked the looks" of it, Transcript for 10/23/95 at 51, and that when he purchased the tractor he did not speak to anyone at the dealership about the tractor and did not seek the advice of the dealer about it. Transcript for 10/24/95 at 61. Freeman responds that he ordered a mower attachment with the tractor, without specifying the model he desired, and was supplied with a particular model. This, he contends, is sufficient to create a jury question as to the issue of the warranty of fitness for a particular purpose. While this argument may be valid if the mower attachment was alleged to be defective, it appears from the facts that this particular piece of equipment worked all too well. The court grants

Case's motion for judgment as a matter of law as to the implied warranty of fitness for a particular purpose.

In addition to the warranty of fitness, Freeman argued that Case breached the implied warranty of merchantability. The court assumes without deciding that the evidence submitted as to defect was sufficient to carry the burden of proving a breach of this warranty. Unfortunately, the issue of breach of the two implied warranties was presented to the jury in the form of a combined special interrogatory, asking "[d]o you find by a preponderance of the evidence that the defendant breached an implied warranty of merchantability and/or fitness for a particular use and that the vehicle was thereby unreasonably dangerous?" The jury responded to this question in the affirmative. Because it is conceivable that the jury believed that the warranty of fitness for a particular purpose was breached and the warranty of merchantability was not, the court cannot conclude that the insufficiency of evidence of breach of the warranty of fitness is moot. Should it be required to confront the issue due to a remand, the court will be forced to order a new trial as to the issue of the warranty of merchantability.[7]

III. Proximate Cause

Virginia applies a "but for" test to tort liability. *See Wells v. Whittaker*, 207 Va. 616, 622, 151 S.E.2d 422, 428 (1966). Unless the alleged defect is a proximate cause of the

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[7] The only way that the court could be forced to address this issue is if the judgment as a matter of law is reversed as to the issue of open and obvious defect (which bars recovery under both negligence and implied warranty theories) but upheld as to the issue of contributory negligence (which bars recovery only under negligence). This would squarely present the issue of whether some implied warranty was in fact breached, since Freeman could then recover only if he proved a breach of warranty.

plaintiff's injuries, there can be no recovery. *Butler v. Navistar International Transp. Corp.*, 809 F. Supp. 1202, 1207 (W.D. Va. 1991). The burden is on the plaintiff to show to a "reasonable certainty" that the alleged defect caused his injury. *Stokes v. L. Geismar, S.A.*, 815 F. Supp. 904, 908 (E.D. Va. 1993), aff'd 16 F.3d 411 (4th Cir. 1994). Freeman's theory of the accident is that he inadvertently engaged the SRC pedal while deliberately engaging the brake, and that this was due to the dangerous proximity of these pedals. Freeman maintains that the tractor would not have rolled forward after being fully stopped unless the SRC was engaged, *see, e.g.*, Transcript for 10/24/95 at 93-96, and so his theory directly puts to the finder of fact the question of whether the alleged defect was a proximate cause of his engaging the SRC. Given the jury's conclusion that Case is liable, it is obvious that it accepted Freeman's theory of the accident and thus found that the defect was a proximate cause of the accident. This finding was not against the clear weight of the evidence. Case's motions for judgment as a matter of law and for a new trial are denied as to this issue.

Case argues that the absence of an OPC was not a proximate cause of the accident.[8] According to the applicable industry standard, ANSI B71.1, an OPC must stop the mower blades within five seconds. Case contends that there is no evidence that the accident took more than five seconds to occur. Since the blades would therefore have been turning

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[8] It is not clear that the absence of an OPC is relevant to causing "the accident," if that term means the chain of events that caused the tractor to roll down the hill. *Cf.* discussion of Virginia law on nonuse of seat belts in Part V(B) of this Opinion (stating that, under Virginia law, evidence of nonuse of seat belts is excluded because irrelevant to the cause of the accident). Because it finds for Freeman on the issue of causation as to both alleged defects, however, the court does not reach this issue.

when they struck Freeman, Case argues, the absence of an OPC is not a cause of the accident.

The evidence put on by Freeman was sufficient to discharge his burden of proof on this issue, because the jury could have concluded from the evidence presented that more than five seconds elapsed from the time Freeman left the seat to the time when he was struck by the blades. It is undisputed that Freeman jumped from the tractor and traveled forty feet from where he left the tractor.[9] After finding himself there, he thought "for an instant" that he was safe, but was then struck by the tractor as it rolled down the hill behind him. There was evidence that the tractor struck at least one tree before rolling over Freeman, that the blades struck numerous rocks and other objects that may have stopped them had an OPC disengaged the power to them, and that the tractor did not travel the forty feet to Freeman in a straight line. The jury could well have concluded from this reconstruction of events that it took the tractor more than five seconds to reach the point where Freeman was struck. In addition, although Freeman's expert testified that he did not know if Freeman would have been injured less severely if the blades had been moving more slowly, it is well within the competence of a lay juror to conclude that blades disengaged from the engine and decelerating would do less damage than blades at full speed and power. The jury's conclusion that the defects alleged were the proximate cause of Freeman's injury was not against the weight of the evidence. Case's motions are denied as to the issue of proximate cause.

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[9] Whether Freeman traveled the forty feet entirely in the air or partially on the ground is a disputed fact, Transcript for 10/24/95 at 104-107, and one properly left to the jury to decide.

IV. Admissibility of Expert Testimony

On September 12, 1995, Case filed a motion in limine seeking the exclusion of the testimony of Freeman's mechanical engineering expert, Reed, under the authority of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786 (1993). In an unpublished memorandum opinion, the court denied the motion, holding that *Daubert* applies only to scientific evidence, of which Reed's proposed testimony was not an example. Case now revisits its arguments and asks the court to reconsider its ruling in light of seven recently decided cases. The authorities cited by Case are virtually identical in kind to those the court has previously rejected, and so the court will not again, as it did before, review each in detail. Of the cases cited, three involved testimony that was clearly scientific in nature. *Dunbar v. Shaklee Corp.*, 31 F.3d 638, 647 n. 15 (8th Cir. 1994) (toxicology and genetic mutation); *U.S. v. Rincon*, 984 F.2d 1003 (9th Cir. 1993), *aff'd without opinion sub nom Rincon v. U.S.*, 510 U.S. 801, 114 S. Ct. 41 (1993) (psychological testimony about the reliability of eyewitness identification); *Arnold v. Riddell, Inc.*, 882 F. Supp. 979 (D.Kan. 1995) (biomechanical aspects of spinal cord injury). Two of the cases are inapplicable because they did not apply *Daubert* in a relevant fashion. *Buckman v. Bombardier Corp.*, 893 F. Supp. 547 (E.D.N.C. 1995) (applying *Daubert* where party offering testimony claimed that it was scientific and based on comparative tests); *Anderson v. National R.R. Pass. Corp.*, 866 F. Supp. 937, 943-45 (E.D. Va. 1994) (citing *Daubert* for proposition that expert testimony must be based on some specialized knowledge and must have a factual basis).

The court notes that there appears to be a number of cases that apply Daubert to testimony the scientific nature of which is doubtful. *See, e.g., American & Foreign Ins. Co.*, 45 F.3d 135 (6th Cir. 1995) (testimony of an electrical

engineer as to testing he performed on a circuit breaker); *Pestel v. Vermeer Manufacturing Co.*, 64 F.3d 382 (8th Cir. 1995) (testimony about need for safety guard on stump cutter); *Byrnes v. Honda Motor Co.*, 887 F. Supp. 279 (S.D. Fla. 1994) (testimony about need for leg protection on motorcycle). Upon close scrutiny of *Daubert* and related authorities, the court can only conclude that these cases are misguided. The context of *Daubert*, the validity of "reanalysis" of raw data of epidemiological studies, was unquestionably scientific, and in its reasoning the Supreme Court relied heavily upon works in the history and philosophy of science. *See* 113 S. Ct. at 2796-97 (citing Carl Hempel's *Philosophy of Natural Science*, Karl Popper's *Conjectures and Refutations*, and several scholarly books and articles on peer review). Furthermore, the Court explicitly stated that its holding was addressed to the context of scientific evidence. After quoting Fed. R. Evid. 702's mandate that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" an expert "may testify thereto," the Court set forth the standards governing testimony pertaining to "scientific . . . knowledge," and clarified in a footnote that "Rule 702 *also applies* to 'technical, or other specialized knowledge.' *Our discussion is limited to the scientific context* because that is the nature of the expertise offered here.". 113 S. Ct. at 2795, 2795 n. 8 (emphasis added).

That *Daubert* is limited to a scientific context has been widely recognized. The Ninth Circuit, addressing the admissibility of the evidence in the *Daubert* case on remand, recognized that the Supreme Court's decision was addressed to the "scientific . . . knowledge" aspect of Rule 702. *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1316 (9th Cir. 1995). In another case remanded to the Ninth Circuit for reconsideration in light of *Daubert*, the court again recognized that *Daubert* applied only to scientific

testimony. *U.S. v. Rincon*, 28 F.3d 921, 923 n. 3 (9th Cir. 1994). A correct understanding of *Daubert* is not limited to the Ninth Circuit. *See, e.g., Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1383 (4th Cir. 1995) (stating that *Daubert* interpreted "the admissibility of expert scientific evidence"); *Iacobelli Const., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) (*Daubert* inapplicable to expert testimony on construction site conditions, contract documents and project results, because such testimony is not scientific); *Dunbar*, 31 F.3d at 647 n. 15 (listing 33 cases applying *Daubert* to such patently scientific matters as DNA analysis, chromatography, economic testimony, and psychological syndromes). The court must conclude that cases applying *Daubert* to merely technical testimony are aberrational. In any event, unless and until it is compelled by binding precedent to extend *Daubert* to a nonscientific context such as the examination of a tractor by a mechanical engineer, this court shall decline to do so. Case's motions as to the admissibility of Reed's testimony are denied.

V. Affirmative Defenses

Case has advanced four affirmative defenses which, though distinct, share a core of relevant facts and so will be addressed together. Case contends that the alleged defects were open and obvious, that Freeman's actions amounted to contributory negligence, that Freeman assumed the risk of his injury, and that Freeman's actions constituted unforeseeable misuse of the tractor. The court shall address each defense in turn.[10]

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[10] These four defenses are so closely related that they are routinely conflated or at least analyzed simultaneously, but are nonetheless distinct. The law applicable to each defense is set forth in some detail in the appropriate section, but for ease of reference, the following chart distills the applicable Virginia law. For each

(continued...)

A. Open and obvious

Most jurisdictions have rejected the open and obvious defense to claims of design defect. *See Restatement (Third) of Torts*, Tentative Draft No. 2, § 2, Comment at V(4) (enumerating cases). Although the Fourth Circuit has recently held open the possibility that Virginia law could move in this direction, *Austin v. Clark Equip. Co.*, 48 F.3d 833, 837 (4th Cir. 1995) (*Austin I*) ("[w]e are not excluding the possibility that there may be an unreasonably dangerous product with an open and obvious defect"), it is clear that Virginia has not adopted the Restatement view. *See Austin v. Clark Equip. Co.*, 821 F. Supp. 1130, 1133 (W.D. Va. 1993) (*Austin II*) (manufacturer not liable for defective design

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[10](...continued)
defense, the chart indicates whether it serves as a bar in negligence and in warranty, whether an objective or a subjective standard applies, and whose point of view is relevant. "Warranty" in this context refers to any implied warranty, whether of merchantability or fitness for a particular purpose. *See Wood v. Bass Pro Shops*, 250 Va. 297, 300-01, 462 S.E.2d 101, 103 (1995) (setting forth which defenses are applicable to "implied warranty" cases and which are not). The entries in the point of view row assume a conventional case in which an injured plaintiff sues a defendant; appropriate adjustments must be made if the positions are reversed, or if there are counterclaims.

	Open/Obvious	Contrib. Negl.	Assumpt. Risk	Unfrsbi. Misuse
Bar in Negligence	Yes	Yes	Yes	Yes
Bar in Warranty	Yes	No	No	Yes
Obj./Subj. Standard	Objective	Objective	Subjective	Objective
Whose Point of View	Plaintiff's	Plaintiff's	Plaintiff's	Defendant's

where danger is open and obvious); *Harris-Teeter, Inc. v. Burroughs*, 241 Va. 1, 4, 399 S.E.2d 801, 802 (1991) (provider of cake not liable in negligence where plastic decoration swallowed by plaintiff was in plain view); *Wood v. Bass Pro Shops, Inc.*, 250 Va. 297, 301, 462 S.E.2d 101, 103 (1995) (no recovery under implied warranty where alleged defect is "known, visible or obvious"). A plaintiff will be barred from recovering if he actually did know or should have known of the risk that caused his injury. *Austin I*, 48 F.3d at 836 (stating that risk is open and obvious if user "is or should be aware of the obvious danger"); *Scott v. City of Lynchburg*, 241 Va. 64, 66-67, 399 S.E.2d 809, 810 (1991) (actual knowledge of open and obvious danger bars recovery); *Harris-Teeter*, 241 Va. at 4, 397 S.E.2d at 802 (holding that danger in plain view bars recovery, without discussing any evidence of actual knowledge); *Spangler v. Kranco*, 481 F.2d 373, 375 (3d Cir. 1973) (holding that lack of bell on crane was open and obvious without discussing any evidence of actual knowledge). The open and obvious rule applies both to negligence and to breach of warranty claims. *Wood*, 250 Va. at 301, 462 S.E.2d at 103. This rule of law has been applied to bar recovery where the plaintiff complains of the absence of such features as a safety canopy on a coal mine roof bolter, *Belcher v. J.H. Fletcher & Co.*, No. 93-2424, 1995 U.S. App. LEXIS 11659, 1995 WL 300030 (4th Cir. May 18, 1995), a bell on a crane, *Spangler*, 481 F.2d at 375, and rear view mirrors, warning lights and alarms on a forklift, *Austin I*, 48 F.3d at 836. The question of whether an alleged defect is open and obvious is for the jury to decide, unless reasonable minds could not differ on the issue. *Id.*

Case contends that the dangerous proximity of the brake and SRC pedals is patently obvious upon inspection, and that the absence of an OPC is obvious upon inspecting the machine, rising from the seat while the mower is operating, or reading the manual. Freeman responds that while the

proximity of the brake and SRC pedals may be obvious, the danger presented by that proximity is not obvious. In addition, Freeman argues, the OPC is a hidden mechanism, not readily apparent or visible to an operator.

Freeman's argument that knowledge of the proximity of the pedals does not amount to knowledge of the danger posed by that proximity is a distinction without a difference. Such a distinction could under some circumstances defeat an open and obvious defense, as for example when a mechanism in plain view has an obscure and unexpected effect when engaged. No such circumstances exist here.[11] Freeman knew where the SRC pedal was, knew that it was close to the brake, and knew that depressing it would cause the tractor to move forward. Transcript for 11/1/95 at 7-14, 7-35. The risk of depressing the SRC, or of depressing a pedal where he knew the SRC to be without looking to see which pedal was depressed, was an open and obvious one.[12]

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[11] Prior to hearing testimony, the court felt that this issue was uncertain enough to go to the jury. *Memorandum Opinion* of Oct. 13, 1995 at 12. For the reasons stated, the court is no longer of this opinion.

[12] The situation is analogous to that posed by the proximity of the brake and accelerator pedals in an automobile. In part to facilitate rapid access to both, these pedals are adjacent to one another and are often close enough to permit simultaneous engagement. This fact does not, however, constitute defective design. *See Jackson v. Mazda Motor of America, Inc.*, 872 F. Supp. 1464, 1467 (D.Md. 1995) (where plaintiff complains of sudden acceleration and testified that her foot was on the brake, but the only plausible cause of accident was inadvertent engagement of accelerator, no design defect exists); *Wells v. Jeep Corp.*, 532 P.2d 595, 597-98 (Wyo. 1975) (fact that driver inadvertently engaged accelerator while depressing brake does not render placement of accelerator and brake pedals defective). Because of the court's holding today granting judgment as a matter

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The absence of an OPC was also open and obvious. Freeman had extensive experience with an OPC-equipped John Deere riding mower, had worked all his adult life with machinery of all types, had inspected the Case 1130 and read portions of the operator's manual, and had mowed the lawn twice with it prior to the accident.[13] Although an OPC is a "hidden" mechanism, it is one that has a noticeable effect upon the operation of a tractor-mower: when the operator's weight leaves the seat, the blades stop within five seconds. Given Freeman's experience, he either knew or should have known that the Case 1130 lacked an OPC, and so this absence was open and obvious.

The court has previously ruled that the pedal configuration and the absence of an OPC were open and obvious as a matter of law. Transcript for 10/31/95 at 6A-25 to 6A-26. This ruling was made in the course of dismissing Freeman's failure to warn claim against Case, but it disposes of the issues of negligence and breach of warranty as well.[14] Although some of the Virginia cases establishing the open and obvious defense are failure to warn cases, *see,*

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[12](...continued)
of law to Case, it is unnecessary to address the issue of whether a design defect could be proven to exist with respect to the tractor's pedal configuration. The court's holding at this time is simply that the pedal configuration, *if* defective, was open and obvious.

[13] Although the tractor had nineteen hours of use recorded on a use monitor, no more than two uses of the tractor to mow his lawn, and one to spread fertilizer, for at least four hours of total use, are clearly attributable to Freeman. *See* Transcript for 11/1/95 at 7-13, 7-26 to 7-27, Transcript for 10/24/95 at 82.

[14] This ruling was made from the bench on the sixth day of trial, and the applicability of the open and obvious defense to the design defect and warranty claims was neither briefed nor argued at that time.

e.g., *Austin I*, 48 F.3d at 836; *Spangler*, 481 F.2d at 375, it is clear that the defense is applicable outside of the failure to warn context. *See*, *e.g.*, *Wood*, 250 Va. at 301, 462 S.E.2d at 103 (implied warranty); *Harris-Teeter*, 241 Va. at 4, 399 S.E.2d at 802 (negligence). Judgment as a matter of law is accordingly granted to Case as to both the design defect and the implied warranty claims because the risks were open and obvious.

B. Contributory negligence

Virginia follows a contributory negligence regime for products liability cases grounded in negligence. *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 373 (4th Cir. 1983); *Hoban v. Grumman Corp.*, 717 F. Supp. 1129, 1136 (E.D. Va. 1989). A plaintiff's contributory negligence will not, however, bar his recovery under a breach of warranty theory. *Wood*, 250 Va. at 300-01, 462 S.E.2d at 103. A plaintiff's negligence claim is barred by his contributory negligence if he failed to act as a reasonable person would have acted for his own safety under the circumstances. *Artrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 358, 397 S.E.2d 821, 824 (1990). The standard is an objective one. *Id.* Unless reasonable minds could not differ on the issue, it is one for jury to decide. *Id.* at 358, 397 S.E.2d at 823.

Case contends that the following actions by Freeman constitute contributory negligence: failing to read the operating manuals and the safety warnings therein in detail, failing to wear a seat belt, and operating the tractor close to an embankment. Once the tractor was stopped at the edge of the embankment, Case argues that Freeman compounded his earlier acts of negligence by reengaging the mower blade rather than retreating in reverse or taking steps to immobilize

the tractor, and by "popping his foot off the clutch," rather than releasing it slowly.[15]

As an initial matter, the fact that Freeman was not wearing a seat belt cannot be taken into consideration under Virginia law. Virginia has never permitted evidence of failure to wear a seat belt to demonstrate the injured party's negligence in automobile cases. Until 1989, such evidence could be presented by the defense to reduce damages, but this practice was eliminated by Va. Code § 46.2-1094(E), which forbids evidence of nonuse of seat belts in a motor vehicle with respect to both liability and damages. Although no Virginia court has addressed the issue of whether automotive seat belt laws pertain also to the use of seat belts in a nonautomotive context, the Fourth Circuit has addressed the admissibility of evidence of nonuse of safety devices generally under Virginia law. *Garrett v. Desa Industries, Inc.*, 705 F.2d 721 (4th Cir. 1983). The plaintiff in *Garrett* was injured while using a stud driver without the included safety goggles. The trial judge permitted the defendant to raise the issue of nonuse of the safety goggles, and the Fourth Circuit reversed, analogizing the nonuse to the failure to wear a seat belt. The court considered persuasive the rationale of the leading Virginia case on the exclusion of evidence of failure to wear a seat belt, *Wilson v. Volkswagen of America*, 445 F. Supp. 1368 (E.D. Va. 1978):

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[15] How quickly Freeman removed his foot from the clutch was a matter of significant dispute at trial. Transcript for 11/1/95 at 7-21; Transcript for 10/24/95 at 91-93. According to Freeman, however, the Case 1130 transmission is such that the motor engages fully and without slippage regardless of the speed of clutch release. Transcript for 10/24/95 at 92. The analysis that follows assumes without deciding that Freeman released the clutch in a normal fashion, as he now claims.

> We believe that the analysis in *Wilson* is both persuasive and directly applicable to the nonuse of safety goggles. The stud driver would have exploded whether or not Garrett was wearing safety goggles. His nonuse of the goggles was not a proximate cause of that explosion. Thus, since Desa did not demonstrate that Garrett's eye injury could have been avoided or would have been less severe had he been wearing the goggles, the requested jury instructions [that nonuse of the goggles was not evidence of contributory negligence] should have been granted. Furthermore, on remand, Desa may not introduce evidence of the nonuse unless and until it demonstrates the extent to which Garrett's injuries could have been avoided by wearing safety goggles.

Garrett, 705 F.2d at 726. Although it is clear that in 1983 the Fourth Circuit, faced with the case at bar, would have permitted evidence of nonuse of the seat belt to show mitigation of damages, it appears that it would not permit even this use today. At the time of the *Garrett* decision, Va. Code § 46.2-1094(E) did not exist. The Fourth Circuit simply applied then-existing Virginia law applicable to seat belts to the issue of nonuse of safety devices generally, finding the purpose and logic of the seat belt law analogous. Since neither the purpose nor the logic has changed, the court must conclude that nonuse of a safety device cannot be used in Virginia either in support of a defense to liability or in mitigation of damages. Freeman's nonuse of the seat belt will therefore not be considered in the court's analysis of any of Case's affirmative defenses.[16]

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[16] Given Virginia's expansion of the scope of the exclusion of evidence of nonuse of a seat belt since *Garrett*, the Fourth Circuit may wish to reconsider its holding in that case, at least in circumstances such as are now before the court. Faced with the

(continued...)

The court now turns to Case's remaining contentions. Freeman's alleged failure to read the operator's manual is not so clear as Case maintains. Freeman testified to reading the manual, or parts thereof, in at least two places in his deposition. Freeman Depo. at 127, 155. In addition, he testified to the fact that he examined each of the controls and its function before starting the tractor for the first time. *Id.* at 115. The Case 1130 has a number of instructions printed directly on or near the controls, and so his inspection could well have included reading these as well. The court is most unwilling to conclude that a failure to read an operator's manual cover to cover is so clearly negligent that reasonable minds could not disagree. *Cf. Butler v. Navistar International Transp. Corp.*, 809 F. Supp. 1202, 1208 n. 9 (W.D. Va. 1991) (warning in tractor manual does not discharge manufacturer's duty to warn absent evidence that plaintiff read the manual). The matter was properly submitted to the jury, and the jury's decision was not against the weight of the evidence.

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[16](...cortinued)
problem of providing for operator safety in the event of tractor tipover, Case provided an integrated safety system well-designed for the purpose, the ROPS. The failure of an operator to use a seat belt renders a ROPS useless as a safety device, reducing a system that would ordinarily prevent or greatly reduce injury to a nullity. It seems unduly harsh not to permit Case to argue that this nonuse was relevant either to negligence or to mitigation of damages, but such appears to be the law in Virginia. *Compare Long v. Deere & Co.*, 715 P.2d 1023, 1030 (Kan. 1986) (finding that Kansas statute excluding evidence of nonuse of seat belts in automobile cases has no bearing on issue of nonuse of seat belts with construction machinery "under conditions which admittedly will result in death or injury in a roll over unless seat belts are used"). There is no reason to suppose that the concerns that motivated the Virginia General Assembly to bar evidence of the nonuse of seat belts in automobile cases are identical to those relevant outside that context.

The testimony presented at trial on the issue of operating the tractor near an embankment was somewhat ambiguous as to the degree of risk presented. For example, Case's expert, Bernard Ross, testified that:

> the operator's manual says clearly that you should avoid operating on slopes and be very careful. And I'm not condemning Mr. Freeman for trying to mow his lawn up to the, close to the edge, but it is mentioned in the operator's manual that this is risky business, I mean, requires more caution, and more concern, and attention.

Transcript for 10/26/95 at 4-114 to 4-115 (testimony of Bernard Ross). It appears that simply operating the tractor close to an embankment is not necessarily contributory negligence. However, Freeman's decision to mow near the embankment must be considered in combination with his other actions. The evidence showed that Freeman stopped the tractor at or near the edge of the embankment, placed his foot in the immediate area where he knew the SRC pedal to be without checking to ensure that his foot was not on that pedal, depressed the SRC together with the brake,[17] and then released the clutch. Freeman knew that releasing the clutch with the SRC engaged would cause the tractor to move forward, Transcript for 11/1/95 at 7-35, but did not ensure that his foot was not on the SRC. He chose to do this rather than turn off the tractor, as the manual recommends when the tractor strikes an obstruction. He also could have

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[17] Freeman testified that he was "positive" that he had his foot on the brake, Transcript for 10/24/95 at 6, and Freeman's theory of the accident is that the tractor could not have moved forward unless the SRC was also depressed. Transcript for 10/24/95 at 93-95. The issue of whether Freeman did or did not actually depress the brake pedal is not relevant to the court's reasoning on this issue.

eliminated the risk by placing the tractor in neutral or by backing away from the edge before restarting the blades. Transcript for 10/24/95 at 86; Transcript for 11/1/95 at 7-35. The court holds as a matter of law that Freeman did not act as a reasonable person would have acted for his own safety under the circumstances. *Artrip*, 240 Va. at 358, 397 S.E.2d at 824. This holding is in accord with, though not dependent upon, Virginia case law providing that a person who is aware of an open and obvious condition and, without excuse, forgets about the condition or ignores it thereby commits contributory negligence as a matter of law. *See Scott v. City of Lynchburg*, 241 Va. 64, 66-67, 399 S.E.2d 809, 810-11 (1991) (enumerating cases). Case's motion for judgment as a matter of law is therefore granted as to the negligence claim due to Freeman's contributory negligence.[18]

C. Assumption of the risk

Assumption of the risk bars a plaintiff's recovery in negligence, but not under a warranty claim. *Wood*, 250 Va. at 301, 462 S.E.2d at 103. This defense focuses on the injured person's subjective state of mind, asking whether "plaintiff fully understood the nature and extent of a known danger and voluntarily exposed himself to it." *Artrip*, 240 Va. at 358, 397 S.E.2d at 824 (citing *Philip Morris Inc. v. Emerson*, 235 Va. 380, 402-402, 368 S.E.2d 268, 280 (1988)). Unless reasonable minds could not differ on the issue, it is for the jury to decide. *Artrip*, 240 Va. at 358, 397 S.E.2d at 823.

Case contends that Freeman was aware of the proximity of the brake and SRC pedals, of the risks of mowing near an embankment, and of the danger posed by not wearing his

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[18] As stated at the beginning of this section, this holding has no effect on the breach of warranty claim. *Wood*, 250 Va. at 300-01, 462 S.E.2d at 103.

seat belt, and that he voluntarily exposed himself to these risks. As before, the nonuse of the seat belt cannot be considered.

That a risk is open and obvious does not establish that a plaintiff "fully understood the nature and extent" of it. *Id.* Although the court today holds that the proximity of the brake and SRC pedals and the lack of an OPC were open and obvious, and that Freeman's actions constituted contributory negligence, the burden on Case as to these defenses was simply to show that Freeman knew or should have known of the risks. *Austin I*, 48 F.3d at 836 (open and obvious); *Artrip*, 240 Va. at 358, 397 S.E.2d at 823 (contributory negligence). The evidence was ample to discharge this burden, demonstrating as it did Freeman's extensive experience and the carelessness of his actions in light of that experience. However, this evidence does not rise to the level of discharging Case's burden to demonstrate "what the particular plaintiff *in fact* sees, knows, understands and appreciates." *Philip Morris*, 235 Va. at 402, 368 S.E.2d at 280 (quoting *Restatement (Second) of Torts* § 496D, Comment c (1965)) (emphasis added). The evidence presented was sufficient to support an inference that Freeman was actually aware of the risks, but was not so overwhelming as to compel such an inference. Because the court cannot say as a matter of law either that Freeman did or did not assume the risk of his injury, this issue was properly a matter for the jury, and the jury's decision was not against the clear weight of the evidence. Case's motions are accordingly denied as to this point.

D. Unforeseeable misuse

The defense of unforeseeabie misuse is available to a defendant sued under either negligence or warranty theories. *Wood*, 250 Va. at 301, 462 S.E.2d at 103. Although the language used to describe this defense sometimes suggests

that the manufacturer's subjective state of mind is at issue, *see Featherall v. Firestone*, 219 Va. 949, 964, 252 S.E.2d 358, 367 (1979) ("unforeseen" misuse); *Turner v. Manning, Maxwell & Moore*, 216 Va. 245, 252, 217 S.E.2d 863, 869 (no liability when product used in manner "not intended" for it), the decisions make it clear that an ordinary reasonableness standard applies. *See id.* (holding that use of crane to pry fused metal parts free was not a "reasonably foreseeable purpose"); *Featherall*, 219 Va. at 964, 252 S.E.2d at 368 (use of different manufacturer's parts with a product is not a use that "should have been expected" by defendant). The issue is thus whether Freeman misused the tractor in a fashion not reasonably foreseeable to Case.

The actions that allegedly constitute misuse are Freeman's failure to wear a seat belt, which cannot be considered, his decision to mow near the embankment, and his "popping" the clutch. Case contends that under Virginia law, a manufacturer is entitled to a presumption that its warnings will be heeded. This does not appear to be true. In *Besser Company v. Hansen*, 243 Va. 267, 415 S.E.2d 138 (1992), the case cited for this proposition, the court considered whether the manufacturer reasonably should have foreseen that an operator would fail to heed the warnings on a control panel. The court reasoned that "[n]or did Besser *have reason to know or foresee* that an operator would not realize that danger and heed the warnings on the panel." *Id.* at 277, 415 S.E.2d at 144 (emphasis added). In reaching this conclusion, the court relied in part upon the testimony of a witness that the risk posed by ignoring the panel instructions was obvious. *Id.* Such testimony would of course be irrelevant if a manufacturer was entitled to a presumption that a failure to heed its warnings is unforeseeable.

The court must therefore consider whether Case has demonstrated that it should not reasonably have foreseen such

actions by operators as Freeman's decision to mow near an embankment. Case did not meet this burden. The use of riding mowers and of tractors with belly mowers on slopes, whether wise or not, is not an unknown phenomenon. In addition, the trial testimony of Case witness Bernard Ross, excerpted above, suggests only that "operating on slopes" should be avoided, and that mowing close to an embankment requires an increased level of caution. Transcript for 10/26/95 at 4-114 to 4-115. This evidence is insufficient to establish that Case did not and should not reasonably have foreseen that its 1130-series tractor might be used near the edge of an embankment.

As for Freeman's "popping" the clutch, evidence was presented from which the jury could conclude that Freeman released the clutch in a normal fashion. In any event, the rapid release of a clutch, an action Case characterizes as appropriate only during drag-racing or in an emergency, is certainly not unknown outside that context. For example, one of the difficult tasks in learning to drive an automobile with a manual transmission is mastering the skill of releasing the clutch neither too slowly nor too quickly. A person who, like Freeman, does not expect that his action will cause his conveyance to move, may well release the clutch rapidly, and this action may well be foreseeable. The foreseeability of this action, if indeed it occurred, was properly a matter for the jury.

Because the issue of foreseeable misuse was properly left to the jury, and because the jury's decision as to this issue was not against the clear weight of the evidence, Case's motions are denied.

VI. Juror Testing of Tractor

At trial the court allowed a "show" of the tractor involved in the accident, during which the parties pointed out

various features that they believed to be important to the issue of liability. One of these features, the placement of the brake and SRC pedals, was the subject of a significant amount of expert testimony and a number of photographs. After the demonstration, the court granted the request of two jurors to sit in the tractor in order to inspect it more fully. During this examination, the jurors observed the placement of the pedals from the operator's viewpoint, and both placed their feet on the brake and SRC pedals and depressed them several times.

Case asserts that these actions were improper and resulted in the consideration of extraneous material by the jury, improperly influencing its decision. Case maintains that this conduct requires a new trial on all issues. This court concludes that the inspection and examination of the tractor by the two jurors in the presence of the court, counsel for both parties, and the remaining jurors, was not improper and does not mandate a new trial.

Both parties rely on *United States v. Beach*, 296 F.2d 153 (4th Cir. 1961). In *Beach*, the jury convicted the defendant of perjury for testifying that he had not heard adding machines in a house he often visited. During its deliberations, the jury requested and received an electric drop cord. The Fourth Circuit held that sending the drop cord to the jury was error entitling defendant to a new trial if the jury used the cord to experiment with the adding machines. *Id.* at 159.

The present case is fundamentally different from *Beach* because of the circumstances and subject matter involved. In the case at bar, the only object considered was the tractor submitted for examination before open court. No other device was employed to test the tractor. Two of the jurors merely mounted the tractor and depressed its pedals in order to inspect it more closely. Such closer examinations are not

prohibited. In fact, *Beach* expressly allows closer inspections of exhibits on the part of the jurors even outside the presence of the court or counsel. *Beach* provides that "the mere making of a more critical examination of an exhibit than was made during trial is not objectionable." *Id.* at 159.[19]

The Tenth Circuit has also addressed the issue of closer examination of evidence by jurors. *Taylor v. Reo Motors, Inc.*, 275 F.2d 699 (10th Cir. 1960), involved consolidated actions for wrongful death and property damage against the manufacturer of a motor-freight tractor for alleged manufacturing defects in the heat exchange mechanism of the fuel system. During trial the heat exchange mechanism was introduced into evidence and was dismantled and reassembled by expert witnesses. The jury was permitted to take the mechanism to the jury room during its deliberations. In the course of its deliberations, the jury dismantled and reassembled the heat exchanger with pocket knives and other tools belonging to the jury. The Tenth Circuit held that the jurors' actions were proper for the purpose of testing the validity of statements made in open court. *Id.* at 705-706.

Although it is not binding, this court finds much of the Tenth Circuit's reasoning persuasive. While not necessarily willing to condone the unsupervised dismantling and reassembling of mechanical objects by jurors, the court agrees with *Taylor*'s holding that it is within the court's discretion to allow jurors to examine more closely evidence that has been the subject of relevant testimony. As noted, in the present case the jurors heard and saw substantial

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[19] *Beach* further provides by way of example that "the use of a magnifying glass not introduced in evidence, without the knowledge and consent of the parties and without permission of the court, is not reversible error where such action involves merely a more critical examination of an exhibit." *Id.*

testimony concerning the location of the pedals. This was a major point of contention bearing on the issue of liability. The fact that jurors sat in the tractor and depressed the pedals does not constitute "extraneous evidence," as Case claims. On the contrary, the jurors' actions constituted a more critical examination of the evidence. Consequently, the court finds that Case is not entitled to a new trial based upon the actions of the two jurors.

VII. Remittitur

Case argues that the jury's award of $3.8 million is so excessive as to warrant a new trial or a remittitur of a portion of the award. Under Virginia law, a court has several options if it concludes that a monetary award is excessive. If "the evidence does not preponderate in favor of either party and the damage award is so large that it appears to be solely the product of sympathy," the court may order a new trial on all issues. *Bartholomew*, 224 Va. at 434, 297 S.E.2d at 682. If the monetary award is "out of proportion to the injuries suffered," but not so large that the jury's verdict as to liability is impeached, the court may put the plaintiff to the choice of accepting a remittitur or facing a new trial, Va. Code § 8.01-383.1, or may grant the defendant a new trial limited to the issue of damages, Va. Code § 8.01-383. *Bartholomew*, 224 Va. at 434, 297 S.E.2d at 682. The trial court has broad discretion to determine whether an award is excessive and what steps to take if it concludes that it is. *Id.* The Virginia Supreme Court has stated the duty of a trial judge thus:

> While a trial judge may not arbitrarily substitute his opinion for that of the jury, he has both the power and the duty to correct a verdict which he finds so excessive as to shock the conscience of the court or to compel the conclusion that the verdict was the

> product of passion or prejudice or some misunderstanding of the facts or the law.

Hogan v. Carter & Grinstead, 226 Va. 361, 372, 310 S.E.2d 666, 672 (1983). The court is of the opinion that the damages awarded were excessive. Because it grants judgment as a matter of law to Case, it is unnecessary to address this issue now.[20] Should the court's judgment in favor of Case be reversed, however, the court will on remand decide whether to grant a new trial on all issues, grant a new trial on the issue of damages only, or put the plaintiff to the choice of accepting a remittitur or facing a new trial. This decision is presently unnecessary considering the other holdings of the court. Should the issue recur, the court will further elaborate on its decision that the verdict is excessive and will hear additional argument of counsel on these issues.

CONCLUSION

For the reasons stated, the court grants defendant Case's motion for judgment as a matter of law. An appropriate order shall be entered this day.

The Clerk is directed to send certified copies of this Opinion to all counsel of record. This case shall be stricken from the docket.

ENTER: This 19 day of April, 1996.

/s/ Glen M. Williams
SENIOR UNITED STATES DISTRICT COURT JUDGE

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[20] It would be difficult to analyze the issue of damages properly now, since the relevant portions of the trial testimony have not yet been transcribed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DANIEL FREEMAN and MARY FREEMAN,	)	
Plaintiffs,	)	CIVIL ACTION NO. 94-0063-A
v.	)	ORDER
CASE CORPORATION,	)	BY: THE HONORABLE GLEN M. WILLIAMS
Defendant.	)	

[Filed October 13, 1995]

For reasons stated in a memorandum opinion entered this day, it is ADJUDGED AND ORDERED as follows:

Defendants' motion for exclusion of expert testimony is denied. Defendant's motion for summary judgment is denied.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: This 13th day of October, 1995.

/s/ Glen M. Williams
SENIOR UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DANIEL FREEMAN and MARY FREEMAN,	)	
Plaintiffs,	)	CIVIL ACTION NO. 94-0063-A
v.	)	MEMORANDUM OPINION
CASE CORPORATION,	)	BY: THE HONORABLE GLEN M. WILLIAMS
Defendant.	)	

[Filed October 13, 1995]

In this products liability action arising from an accident involving a tractor-mower, defendant Case Corporation ("Case") moves to have the testimony of an expert witness excluded and moves for summary judgment. Both motions are denied.

DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY

Plaintiff Daniel Freeman ("Freeman") was injured when the Case 1130 tractor he was using to mow his yard rolled down a hill in a way which brought him into contact with the mower blades. Plaintiff has offered the testimony of Smith Reed, an expert in mechanical engineering, in order to identify a number of alleged defects in the design of the tractor which he claims are responsible for Plaintiff's injuries.

The admissibility of expert testimony is governed by Fed. R. Evid. 702.[1] Defendant moves to have this testimony excluded on the ground that it does not satisfy the standards imposed by FRE 702 as interpreted by *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). *Daubert* requires that evidence within its scope be "ground[ed] in the methods and procedures of science" and "supported by appropriate validation." *Id.*, 125 L.Ed. 2d at 481. Defendant urges that the testimony is defective because it lacks adequate scientific methodology and reproducible test results.

The first hurdle which Defendant must clear is that of establishing that *Daubert* is applicable to the type of testimony offered by Plaintiff. *Daubert*, the leading case on the evaluation of expert testimony at the boundaries of mainstream science, involved the controversial technique of "reanalysis" of the raw data of epidemiological studies to reach conclusions contradicting those of the original studies. The decision probes deeply into the subject of scientific methodology, and establishes a new guideline for ascertaining whether the scientific method has been applied with sufficient rigor to a particular theory to permit its introduction into court. Scholars and philosophers of science are cited in the course of the decision. *See, e.g., id.* at 483 (citing Carl Hempel's *Philosophy of Natural Science*, Karl Popper's *Conjectures and Refutations*, and several scholarly articles and books on the subject of peer review). The language of *Daubert* clearly delineates the limited scope of the decision

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[1] FRE 702 provides as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

in more than one place. *See. e.g., id.* at 481 n. 8 (stating that "[o]ur discussion is limited to the scientific context").

Defendant urges that *Daubert* is applicable not only to such classical scientific subjects as epidemiology, but also to the testimony of Reed that various design elements of the tractor-mower were defective. In support of its position, Defendant points to language in *Daubert* itself, and to several decisions in the 4th Circuit and other jurisdictions purportedly applying *Daubert* in contexts analogous to the one before the court.

First, Defendant argues that footnote eleven of *Daubert* extends the application of that decision to nonscientific contexts. The context of the footnote does not support this interpretation. Footnote eleven annotates the following language: "Faced with a proffer of *expert scientific testimony*, then, the trial judge must determine. . . whether the expert is proposing to testify to (1) *scientific knowledge* that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 482 (emphasis added). On its face, then, the test which the footnote clarifies is inapplicable to nonscientific knowledge. Footnote eleven itself states that although the leading precursor decision to *Daubert*[2] focused on novel scientific techniques, the scope of FRE 702 is broader. In context, and taken together with footnote eight, quoted above, it is clear that the Court delineates three categories of evidence. The broadest is that addressed by Rule 702, and this includes scientific, technical, and other specialized knowledge. *See id.* at 481 n. 8. The next broadest is that addressed by *Daubert* itself, all *scientific* knowledge. *Id.* at 482 n. 11. The narrowest category is that of the superseded *Frye* decision, addressing only *novel* scientific techniques. *Id.* Footnote eleven is unhelpful to

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[2] *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

Defendant; if anything, it further clarifies that *Daubert* applies only to scientific knowledge.

Defendant next cites several cases which, it claims, apply *Daubert* to facts sufficiently analogous to those before the court to suggest that the *Daubert* test should be applied here. Each is inapplicable. *Cavallo v. Star Enterprise*, No. 94-1499-A (E.D. Va. July 10, 1995) applies *Daubert* to the testimony of two doctors that exposure to petroleum fumes caused certain injuries in the plaintiff. In the context of a toxic tort case like *Cavallo*, where causation is often highly speculative, complex, and difficult to comprehend, the gatekeeping function of *Daubert* is clearly indicated, and only scientifically reliable evidence of (in this case) the link between petroleum vapors and human injuries should be presented to the jury. The court is now faced with a products liability suit for mechanical defect however, presenting very different issues.[3] In addition, *Cavallo* agrees

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[3] The court is aware that the distinction between "scientific" and "non-scientific" knowledge is not marked by a bright line. At the margin, science shades indistinguishably into other areas of knowledge, and no principled stopping place exists between science and nonscience. If the facts before the court fell into such a marginal area, the court would be faced with a very difficult task of interpretation of the meaning of *Daubert*. No such difficulty exists, however, as the expert testimony which Plaintiff wishes to present is clearly not of the sort which is or should be addressed by *Daubert*. The difficulties of determining the causes of human ailments due to exposure to toxic or hazardous substances are well known by practitioners of medicine and law. Individual physical differences and alternate causes are two of the familiar confounding factors. When such issues are presented, the court appropriately demands the standards which science has imposed on like problems; those of epidemiology, which uses statistical analysis of large sample populations to control for the distorting effects invariably present when only one illness is examined. The

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in every respect with this court's interpretation of *Daubert* as applicable only in a scientific context. *See e.g., id.* at *15 ("[a] variety of factors may affect the validity, or reliability, of a particular *scientific* expert opinion . . .") (emphasis added). Another case cited by the defendant, *Lam v. Upjohn Co.*, 1995 WL 441894 (W.D. Va. April 21, 1995), is inapposite for the same reason. The *Lam* court was faced with an expert arguing that the drug Halcion causes suidical behavior, with no scientific or other evidence to support the conclusion. *Daubert*, *Cavallo* and *Lam* all involved subtle issues of causation traditionally addressed by epidemiological methods. The case before the court involves mechanical engineering, an area in which such methods are unnecesary and inappropriate. See supra footnote 3.

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[3](...continued)
methods of epidemiology are not appropriate in the context of mechanical engineering, which is governed by well-understood laws of physics. A piece of metal of known dimension and composition will predictably fail under a particular stress without variance caused by its individual constitution, or whether it has been exposed to cigarette smoke, or whether cancer runs in its family. *Daubert* defines the test to be applied when an expert testifies to a fact of the sort ordinarily established by epidemiological methods, and otherwise does not apply.

In addition, if courts were to apply the rigorous standards of *Daubert* and its progeny (including peer review and studies with repeatable and repeated results) to routine products liability suits alleging mechanical defects, plaintiffs would be required to engage the services of major scientific institutions to secure the sort of evidence necessary to recover. The absence of scientific studies, scholarly texts and journals, conferences, and the like in areas such as lawnmower safety and chainsaw design belie the supposition that this is what the Supreme Court can possibly have had in mind when it decided *Daubert*.

The next case cited by Defendant is *Habecker v. Clark Equipment Co.*, 36 F.3d 278, 289-90 (3d Cir. 1994). In the cited portion of that decision, the Third Circuit upheld the decision of the trial court to exclude the testimony of an Army safety director concerning a simulation he had performed of a forklift accident. The court need not address the issue of whether it agrees that the proffered testimony in *Habecker* was scientific, for two reasons. First, the decision of the trial court was upheld on several independent grounds, and so the Third Circuit's decision did not require an analysis of the applicability of *Daubert*. *Id.* at 289. Second, whether a simulation of an industrial accident is or is not scientific, it is certainly more scientific than an examination of a purportedly defective product after an accident. The court does not find the passing reference to *Daubert* in *Habecker* to be persuasive.

Defendant next cites *Byrnes v. Honda Motor Co.*, 887 F. Supp. 279, 281-82 (S.D. Fla. 1994). In *Byrnes*, the court excluded expert testimony that a motorcycle lacking leg protection is defective because the expert did not, as required by *Daubert*, test this hypothesis in a scientific manner. *Id.* *Byrnes* clearly supports Defendant's contention that *Daubert* is applicable to the analogous expert testimony of Smith Reed. This court, however, must decline to follow the reasoning of the decision for the reasons set forth in footnote 3.

The final case cited by Defendant in support of its claim that *Daubert* applies to Smith Reed's testimony is *Stanczyk v. Black & Decker, Inc.*, 836 F. Supp. 565, 567 (N.D. Ill. 1993). *Stanczyk* involved the admissibility of expert testimony that a power saw could be designed with a blade guard which exposed a much smaller amount of blade than did the design at issue in that case. There is no analogous testimony in the present case. Smith Reed's testimony supports the use of an operator presence control ("OPC"), a

common feature on riding mowers,[4] and wider separation of the brake and speed ratio control ("SRC") pedals, a design which is self-evidently feasible. There is no issue presented, as in *Stanczyk*, that the proposed design may be impossible to achieve from an engineering perspective.

Because *Daubert* is limited to scientific testimony, and because Reed's testimony is technical, not scientific, the court concludes that *Daubert* is inapplicable. This conclusion does not dispose of Defendant's arguments for the exclusion of Reed's testimony, as Defendant has advanced two arguments which do not rely upon *Daubert*. First, Defendant contends that the proffered testimony is insufficient on its own terms. For example, Defendant argues that there is no factual basis for Reed's conclusion that Plaintiff stepped on both the brake and the SRC pedals.[5] While it is true that an

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[4] An operator presence control is a device which automatically cuts off power to the mower blades when the weight of the operator leaves the seat. It is Plaintiff's contention that such a device would have prevented or significantly reduced his injuries.

[5] In its 36-page Memorandum in Support of Motion to Exclude Expert Testimony, Defendant raises numerous issues with the same logical structure, offering detailed arguments for why Reed's opinions do not follow from the facts. For example, Defendant argues that Reed has not shown that an OPC would be statistically safer than a rollbar/seatbelt combination (such as the Case 1130 had), and that Reed did not establish that a warning would have prevented the injuries Plaintiff sustained. These arguments should be directed to a jury, and not to this court in a motion for exclusion. Like the argument concerning the SRC, addressed specifically in the text of this opinion, each of Defendant's arguments requires far too much of Plaintiff at this stage. The expert's testimony need not irrefutably establish each link in a logical chain, but need only be reasonably supported by

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expert may not reach conclusions in the absence of any evidence to support them, *see Stover v. Norfolk & Western Railway Co.*, 249 Va. 192, 455 S.E.2d 238, 243 (1995), this does not mean that a fact must be irrefutably proved in order to be relied upon. Plaintiff has stated in his deposition that he depressed the brake pedal, and both Plaintiff's expert Reed and Defendant's expert Bernard Ross agree that the SRC had to have been depressed in order for the accident to occur. Reed Report at 18; Ross Report at 10, 11. Accordingly, there is sufficient evidence for Reed's assumption.

Defendant makes one final argument for the exclusion of the expert, urging the court to exclude Reed as a sanction for Plaintiff's allegedly wrongful videotaping of the examination of the tractor-mower by Defendant's expert. There is no rational relationship between this action and the testimony of Reed. The most appropriate sanction, if any, is the exclusion of the videotape itself. Because the sanction requested is inappropriate, the court declines to exclude Reed's testimony on this basis, without deciding whether the videotaping was or was not proper.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant argues that even if Reed's testimony is admitted, it is entitled to summary judgment. To prevail on a motion for summary judgment under Fed. R. Civ. P. 56(c), the moving party must demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v.*

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[5](...continued)
the facts. The opinions expressed can be inferences, statistical probabilities, or - of course - opinions. Defendant's detailed factual arguments are misplaced here.

Catrett, 477 U.S. 317, 327 (1986). The burden is on the nonmoving party to "set forth specific facts" that demonstrate a dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). In considering Defendants' motion, the Court views the underlying facts and all reasonable inferences drawn therefrom in the light most favorable to Freeman, the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Contributory Negligence

Defendant argues that this action is barred by Plaintiff's contributory negligence, about which no genuine dispute of material fact exists. Specifically, Defendant urges that recovery is precluded by Plaintiff's failure to read the operator's manual, his decision to use the mower with the blade in a position low enough to strike partially-buried boulders in the yard, his use of the mower near the edge of the hill where the accident occurred, and various details of his operation of the mower immediately after striking a boulder and immediately before the accident. If any of these actions by Plaintiff were so egregious as to constitute negligence as a matter of law, the court would be compelled to grant summary judgment to Defendant. *Airtrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 357, 397 S.E.2d 821, 823 (1990) The standard for whether contributory negligence exists is "whether a plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances." *Id.*, 240 Va. at 358, 397 S.E.2d at 824. Applying this test, the court concludes that a reasonable juror could find that an experienced user of mowers was not negligent in using a mower without reading the entire manual, with the blade low, near a hill, and following familiar procedures effective on a different model of mower when trouble occurred. This being the case, the court

defendant's motion for summary judgment as to the issue of contributory negligence.

Defendant next argues that the evidence offered by Plaintiff fails to establish each of the counts against it: specifically, that the Case 1130 mower is not reasonably safe for its intended use, that Defendant had a duty to warn Plaintiff of various dangers and that it breached this duty, and that Defendant breached warranties of merchantability and fitness for a particular purpose. The court will address each of these arguments in turn.

Safety of Mower for its Intended Use

Under Virginia law, a manufacturer must exercise normal care to produce a product which is reasonably safe for its intended use. *Turner v. Manning, Maxwell & Moore*, 216 Va. 245, 217 S.E.2d 863, 868 (1975). Defendant contends that Plaintiff has not met its burden of setting forth evidence creating a genuine dispute of material fact about each element of this claim. Defendant's arguments fall into two categories. First, Defendant argues that the opinions of Smith Reed are based on mere conjecture, rather than upon facts. These arguments, which are essentially restatements of arguments made by Defendant in its Motion to Exclude, have already been addressed and are hereby rejected.

The second argument advanced by Defendant is that Plaintiff's evidence omits certain vital elements. Defendant argues that Smith Reed's contention that an OPC would have prevented this particular accident does not, even if true, establish negligence, and that Reed does not identify a specific OPC device that would have prevented the accident. Plaintiff has, however, offered more than just a bare assertion by Reed that an OPC would have prevented this accident. Plaintiff points to numerous other tractor-mowers which have OPCs, contends that an engineer employee of

Defendant urged consideration of adding an OPC to the Case 1130 but that no action was taken, and argues that two American National Standards Institute ("ANSI") standards recommending (but not requiring) the use of OPCs were similarly ignored. This other evidence is sufficient in itself to create a genuine issue of material fact with respect to negligence.

Defendant's final argument on the issue of the reasonable safety of the Case 1130 tractor is that Plaintiff offered no evidence of a variance from industry standards, which Defendant contends is required by *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 421-22 (4th Cir. 1993). The standard of *Alevromagiros* is not so difficult to meet as Defendant contends, however. The crucial issue in that case was whether plaintiff had met his burden of demonstrating that the product, a ladder, contained an unreasonably dangerous defect. This burden could be met, the court stated, by evidence of industry or government safety standards, or of consumer expectations, which in turn could be established by actual industry practice, literature, or direct evidence. *Id.* at 420-21. Plaintiff's expert testified only to the condition of the broken ladder, and not to the safety of an undamaged ladder of the same model, to industry standards, or to consumer expectations. In the absence of any such supporting testimony, the court found that the plaintiff had not met its burden of establishing that the ladder had an unreasonably dangerous defect. *Id.* at 421.

In the case at bar, as in *Alevromagiros*, Plaintiff's expert examined the damaged tractor-mower, not an undamaged but otherwise identical tractor-mower. The similarity with *Alevromagiros* ends, there, however. As stated above, Plaintiff offers evidence that Defendant's engineer urged consideration of an OPC, refers to numerous other tractors with OPCs, points to two safety standards allegedly violated by Defendant, and claims, through Reed, that the tractor-

mower contravened the reasonable expectations of consumers. Whether or not some of this evidence constitutes proof of an "industry standard," it is all directed towards the demonstration that the tractor-mower was unreasonably dangerous, and so presents a genuine issue for trial. *See id.* at 420-21. Defendant's motion for summary judgment is denied as to this claim.

Failure to Warn

Defendant challenges Plaintiff's claim that Defendant breached its duty to warn of the absence of an OPC and the dangerous proximity of the brake and SRC on three grounds. First, Defendant claims that Plaintiff's failure to read the operator's manual makes it impossible for Plaintiff to establish that the failure to warn caused his accident. Second, Defendant contends that it cannot be held responsible for not warning of the absence of a feature, since a legal burden would force it to issue thousands of warnings against all possible consumer misconceptions about its products. Finally, Defendant contends that the risk posed by the proximity of the brake and SRC pedal - if such a risk existed at all - was open and obvious, and that a warning would therefore have been superfluous.

Contrary to Defendant's contention, the evidence is not clear as to whether Plaintiff read the operator's manual for the Case 1130. Plaintiff testified to reading the manual, or parts thereof, in at least two places in his deposition. Freeman Dep. at 127, 155. In addition, Plaintiff testified to the fact that he examined each of the controls and their functions before starting the tractor-mower for the first time. Freeman Dep. at 115. The Case 1130 evidently has a number of instructions printed directly on or near the controls, and so his inspection could well have included reading any warnings which were or could have been given there. Viewing all facts in the light most favorable to

Plaintiff, it appears that Plaintiff could have been exposed to any warnings which Defendant chose to offer in the portions of the manual which he read, and on the machine itself. Summary judgment is accordingly denied as to this point.

Defendant's next contention is that it cannot be required to warn of absent features, since such burden would require a vast number of warnings. The relevant warning which Plaintiff contends should have been present, however, is of the absence of a major safety feature present on a large percentage of the tractor-mowers in production. The major safety features of any product are relatively few, and those which are common among similar products but absent in a particular model fewer still, far fewer than the "thousands" which Defendant suggests. The court cannot say as a matter of law that it is unreasonable to require such warnings, and so summary judgment is denied as to this point.

Finally, Defendant argues that the risk of the proximity between the brake and SRC pedals was open and obvious. Although the *proximity* was open and obvious upon inspection, the risk posed by such proximity was not so obvious. A reasonable juror could well conclude that such a risk would have been overlooked by a reasonably prudent person. Summary judgment is accordingly denied as to this argument.

Warranty of Merchantability

Defendant claims that Plaintiff's contributory negligence constitutes unforeseeable misuse of the product, and that his claim of breach of the warranty of merchantability therefore cannot stand. Contributory negligence is not a defense to a breach of warranty claim unless that negligence was unforeseeable. *See Jones v. Meat Packers Equipment Co.*, 723 F.2d 370 (4th Cir. 1983); *Euler v. American Isuzu Motors, Inc.*, 807 F. Supp. 1232, 1236 (W.D. Va. 1992).

In order to prevail on this point as it has argued it, Defendant must first show that Plaintiff was contributorily negligent, and then that this negligence was not foreseeable by Defendant. Because the court has found that a reasonable juror could conclude that Plaintiff was not contributorily negligent, we find that Defendant cannot meet this burden, and deny Defendant's motion for summary judgment as to the claim of breach of the warranty of merchantability.

Warranty of Fitness for a Particular Purpose

The elements of a claim of breach of warranty of fitness for a particular purpose are as follows: (1) knowledge by seller of buyer's particular purpose; (2) reason to know that buyer is relying on seller's implied warranty of fitness; (3) actual reliance by buyer. *Medcom, Inc. v. C. Arthur Weaver Co.*, 232 Va. 80, 348 S.E.2d 243, 246 (1986). Defendant claims that Plaintiff has failed to establish each of these elements. First, Defendant claims that it had no knowledge of Plaintiff's particular purpose, i.e., to mow a dangerously steep, boulder-strewn hill without wearing a safety belt and without reading the operator's manual. Any purpose can be made to look unknowable if narrowly enough defined, and Defendant goes too far in its characterization of Plaintiff's purpose. Because a resonable juror could conclude that Defendant was aware that Plaintiff's purpose was to mow variable terrain with reasonable safety, the court rejects Defendant's argument.

Defendant attacks the second and third elements of the cause of action by pointing to evidence that Plaintiff began his shopping with the intention of purchasing a Case 1130, and would not have purchased anything else. While this appears to be the case, Plaintiff certainly expected that the Case 1130, which appears to be advertised in part for the purpose of mowing lawns, could mow his own lawn safely. If Plaintiff's lawn is safe enough that a reasonably prudent

person would attempt to mow it with a Case 1130, and if the Case 1130 in fact is not capable of completing the job safely, then sale of the Case 1130 constitutes a breach of the implied warranty of fitness for a particular purpose. Because a reasonable juror could conclude that both of these conditionals are true, summary judgment is denied as to this point.

Punitive Damages

The final issue before the court is Defendant's motion for summary judgment as to Plaintiff's claim for punitive damages. Defendant argues that Plaintiff has not demonstrated that its negligence, if any, was so gross as to warrant an award of punitive damages. The standard for imposition of punitive damages is indeed high in Virginia, requiring that a defendant be "guilty of willful and wanton conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences, he consciously and intentionally did some wrongful act or omitted some known duty with the injurious result." *Infant C. v. Boy Scouts of America*, 239 Va. 572 (1990).

In the case at bar, Plaintiff has offered evidence that Defendant was aware that the absence of an OPC may be dangerous, in the form of deposition testimony tending to show that their engineer recommended consideration of installing such a device. Ben Coats Depo. at 124-28. Plaintiff's evidence also purports to show that OPCs are common in the industry and that various standards urge their use. Furthermore, Plaintiff has offered evidence suggesting that much information was available to Defendant regarding the danger of contact with mower blades. From this evidence, a reasonable juror could conclude that Case knew that injury would likely result from its failure to add an OPC

to the design of the Case 1130, and that it was reckless in not making this design change. Summary judgment as to the issue of punitive damages is therefore denied.

CONCLUSION

For the reasons stated, the court denies Defendant's motion to exclude the testimony of Plaintiff's expert Smith Reed, and denies Defendant's motion for summary judgment. An appropriate order will be entered this day.

The Clerk is directed to send certified copies of this Opinion to all counsel of record.

ENTER: This 13th day of October, 1995.

/s/ Glen M. Williams
SENIOR UNITED STATES DISTRICT COURT JUDGE